No. 08-653

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, PETITIONERS

v.

CBS CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The court of appeals has set aside an order of the Federal Communications Commission (FCC or Commission) imposing a forfeiture on respondents for broadcasting the most widely viewed display of public indecency in television history. According to the court, the Commission acted arbitrarily and capriciously, in violation of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, because the order represented an unacknowledged departure from a supposed policy of exempting all brief or fleeting material—including images—from enforcement of statutory and regulatory prohibitions on the broadcast of indecent material. No such policy existed, and the court's holding is inconsistent with settled principles of deference to an agency's reasonable interpretation of its own precedent.

In *FCC* v. *Fox Television Stations, Inc.,* No. 07-582 (argued Nov. 4, 2008), this Court is considering a related APA challenge to the FCC's enforcement of the federal broadcast-indecency prohibitions, which were upheld by the Court in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) (*Pacifica*). More specifically, both this case and *Fox* involve the Commission's treatment of indecent broadcast material that is isolated or fleeting. This Court's decision in *Fox* is likely to discuss the nature and scope of the Commission's prior indecency enforcement policy and the deference owed to the Commission's interpretation of its own policies and practices, and in doing so may inform the Court's assessment of the correctness of the court of appeals' reasoning in this case. The petition should therefore be held pending the decision in *Fox*. At that time, the Court can decide whether to grant certiorari, vacate the decision below, and remand the case for further consideration, or instead to grant certiorari and proceed with plenary review.

A. The Petition Should Be Held Pending This Court's Decision In *Fox* Because *Fox* May Lead The Court Of Appeals To Reconsider Its Analysis Of FCC Precedent

Contrary to respondents' assertion (Br. in Opp. 1) the government does not contend that "the legal question at issue here and in *Fox* is identical." Rather, as respondents correctly observe (*id.* at 11), "the question in *Fox* is whether the Commission's explanation of an *acknowledged* change in policy was sufficient, while the question here is whether the FCC changed its policy *at all* prior to the broadcast under review." In assessing the adequacy of the Commission's explanation for its change in policy in *Fox*, however, this Court will presumably consider what the change was. Doing so will

require the Court to compare the old indecency policy with the new indecency policy and consider the deference owed to the Commission's interpretation of its own policies and practices under administrative-law principles. That inquiry will shed light on the contours of the old policy and whether, in the context of this case, there was any change in policy at all. The prospect that the Court's decision in *Fox* will clarify the proper analysis here is a sufficient reason to hold the petition in this case, even though the two controversies do not present precisely the same legal issue.

The decision in *Fox* is particularly likely to be relevant to this case because the parties in *Fox* disagree about the nature of the FCC's old indecency policy. In *Fox*, the government has argued that the Commission's "general approach to indecency enforcement * * * stress[ed] the critical nature of context," Gov't Br. at 23, *Fox*, *supra* (No. 07-582), but that the FCC had applied an exception to that general rule in cases involving expletives, see *id.* at 17 ("[T]he Commission made one factor dispositive in its analysis in certain cases by holding that the utterance of a single vulgar expletive could not be found indecent, no matter how strongly other contextual factors weighed in favor of such a finding."). The respondents in *Fox* (including respondent CBS), by contrast, have argued that "there never has been an 'automatic exemption to the indecency prohibition for non-repeated expletives.'" NBC, CBS, and ABC Resp. Br. at 53 n.19, *Fox*, *supra* (No. 07-582) (citation omitted); see Fox Resp. Br. at 19, *Fox*, *supra* (No. 07-582) ("There was never a *per se* rule against liability for isolated expletives.").

Significantly, *neither* side's position in *Fox* is consistent with the view of the court of appeals in this case

that the FCC had "a consistent and entrenched policy of excluding fleeting broadcast material"—whether expletives, other kinds of words, or images—"from the scope of actionable indecency." Pet. App. 18a. And neither position is consistent with the view respondents now espouse (Br. in Opp. 2) that "[f]or almost 30 years the FCC held consistently that isolated, fleeting, or unintentional broadcasts of allegedly indecent material were not actionable."

Thus, regardless of the outcome in *Fox*, the Court's reasoning may lead the court of appeals in this case to reconsider its view that the Commission's order departed from a policy of exempting all fleeting material from indecency regulation or, at a minimum, shed light on the legal principles governing that determination. Because the decision in *Fox* ultimately may inform this Court's assessment of the correctness of the court of appeals' judgment in this case, the petition should be held pending the decision in *Fox* and disposed of as appropriate in light of that decision.

B. The Other Issues Identified By Respondents Are Not An Obstacle To Holding The Petition Pending The Decision In *Fox*

Respondents make little effort to argue that the petition should not be held pending the decision in *Fox*. Instead, they suggest (Br. in Opp. 12) that "the petition should be denied *especially if the issue presented is identical*" to that in *Fox*, since "[n]othing would be gained by granting the petition to consider the same question twice." While that observation is relevant to the decision whether to grant plenary review, it provides no basis for declining to hold the petition. In any event,

as explained above, although *Fox* is closely related to this case, the issues in the two cases are not identical.

Respondents are also wrong in contending (Br. in Opp. 12) that this Court's review would not "alter the practical outcome of the decision below." In respondents' view, the Commission would be unable to impose a forfeiture, even if the decision below were vacated, because the government "declined to seek review of another issue necessary to that goal—the requirement of showing scienter." *Ibid.* As noted in the petition (at 23 n.3), however, and as respondents appear to acknowledge (Br. in Opp. 9-10), the Third Circuit's discussion of scienter was dictum. See Pet. App. 81a (Rendell, J., dissenting). More importantly, respondents ignore the court's statement that "[r]ecklessness would appear to suffice as the appropriate scienter threshold for the broadcast indecency regime," *id.* at 74a; its observation that the Commission could meet that standard if it could show "that CBS acted recklessly and not merely negligently when it failed to implement a video delay mechanism for the Halftime Show broadcast," *id.* at 79a; and its suggestion that the Commission might reconsider the issue of scienter on remand, *id.* at 80a. Although the ultimate outcome of proceedings on remand would depend on the facts found by the Commission, the scienter requirement provides no reason to doubt that reconsideration of the APA issues by the court of appeals "may affect the outcome of the litigation." *Tyler* v. *Cain*, 533 U.S. 656, 666 n.6 (2001); see *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996).

Respondents also argue (Br. in Opp. 11) that "[f]urther review" in this case "would be futile, because the Commission's appellate lawyers cannot now supply an explanation that the agency failed to give." But an "ex-

planation" is necessary only if the agency has changed its policy (if there is no change, there is nothing to explain), and the question on which the government has sought review is whether there was any change at all.

Finally, respondents contend (Br. in Opp. 22) that "the doctrine of constitutional avoidance" is a basis for denying review. A grant, vacatur, and remand to the court of appeals to reconsider its ruling on whether the FCC changed its enforcement policy, however, would not require this Court to consider any constitutional questions. Indeed, even if the Court were to grant plenary review, there would be no need for it to consider any constitutional issues. The court of appeals did not address any such issues, and there would be no occasion for this Court to consider them in the first instance. Instead, review could be confined to the non-constitutional questions decided by the court of appeals. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to reach issues that "were not addressed by the Court of Appeals," because "we are a court of review, not of first view"); see also Gov't Reply Br. at 15-18, *Fox*, *supra* (No. 07-582).

Contrary to respondents' suggestion (Br. in Opp. 23), there is in this case no "interrelationship between APA review and First Amendment analysis"—the two issues are analytically distinct. In particular, this case does not involve any disputed question of statutory interpretation that would make it appropriate to invoke the canon that *ambiguous* statutes should be construed so as to avoid serious doubt about their constitutionality. There is no dispute about the interpretation of 18 U.S.C. 1464, which prohibits the broadcast of indecency, and which the Commission has consistently interpreted to bar material—including nudity, such as the image at

issue here—that describes or depicts sexual or excretory organs or activities and that is patently offensive as measured by contemporary community standards for the broadcast medium. See *Pacifica*, 438 U.S. at 731-732. The only dispute concerns the validity of the FCC's enforcement policy under the APA.

C. The Decision Of The Court Of Appeals Is Erroneous

Respondents devote much of their brief to a defense of the court of appeals' merits analysis. That effort provides no basis for denying review. The purpose of holding the petition for *Fox* is to allow this Court to determine *after* that case is decided—and with the benefit of the Court's decision—whether the analysis in *Fox* casts doubt on the reasoning of the court below. In any event, respondents' arguments lack merit.

1. Like the court of appeals, respondents misinterpret the Commission's indecency enforcement framework, and their arguments fail to take account of the deference owed the Commission's reasonable interpretation of its own precedent. Respondents attribute (Br. in Opp. 17) dispositive significance to the observation that "[t]he Commission is unable to cite any case in which it actually explained that images were to be analyzed differently from words." As explained in the petition (at 18-19), however, the Commission has a general indecency framework that applies to both words and images. Under that framework, the Commission considers brevity, but only as one of three factors relevant to the assessment of patent offensiveness. *In re Industry Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999, 8003 ¶ 10 (2001); see *id.* at 8002-8003 ¶ 9 (explaining that the determination whe-

ther a broadcast is "patently offensive" and therefore indecent turns on "the *full context*" in which the material is broadcast). For one subset of cases—those involving expletives—the Commission previously made the brevity factor dispositive. See Gov't Br. at 22-25, *Fox*, *supra*, (No. 07-582). Cases involving allegedly indecent material other than expletives, by contrast, were governed by the general three-factor test.

In contending that a series of orders from 1987 support their view that the prior indecency exception was not limited to expletives, respondents quote (Br. in Opp. 18) the Commission's order in *In re Infinity Broadcast Corp.*, 2 F.C.C.R. 2705 (1987), for the proposition that "deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency." The quoted language, however, does not appear anywhere in that order. It does appear in *In re Pacifica Foundation, Inc.*, 2 F.C.C.R. 2698 (1987), but the context there belies respondents' interpretation. The full sentence reads as follows: "*If a complaint focuses solely on the use of expletives*, we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency." *Id.* at 2699 ¶ 13 (emphasis added). Thus, far from announcing a rule applicable to indecency cases generally, the quoted language by its terms was limited to cases involving expletives.

2. Because respondents seek to invoke an exception to the Commission's general approach to indecency regulation, they have the burden of identifying some statement by the Commission that brief nudity is exempt from indecency regulation. Cf. *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989). Like the court of appeals, they have failed to do so—and no such statement exists. In-

stead, respondents rely (Br. in Opp. 16) on the Commission's order in *In re WGBH Educational Foundation*, 69 F.C.C.2d 1250 (1978), and on a set of unpublished staff letters denying various indecency complaints. But none of those decisions suggested that brief nudity was exempt from indecency regulation. In *WGBH*, the Commission rejected a petition to deny a license renewal, but it did not even discuss the petitioner's allegation that the licensee had broadcast nudity. *Id.* at 1254 ¶ 10 & n.6. And the staff orders respondents cite are similarly cryptic; they say nothing at all about the staff's analysis. Pet. App. 31a-32a.

3. Respondents' view of the regulatory history also fails to account for *In re Young Broadcasting of San Francisco, Inc.*, 19 F.C.C.R. 1751 (2004), issued just days before the 2004 Super Bowl, in which the Commission proposed to impose a forfeiture on a broadcast licensee for televising "less than a second" of nudity. *Id.* at 1755 ¶ 12. Respondents appear to recognize (Br. in Opp. 20) that the treatment of brief nudity in *Young Broadcasting* is inconsistent with the isolated-material exception that respondents believe the FCC formerly applied. Like the court of appeals, however, respondents cannot explain why the FCC, in a case like *Young Broadcasting*, would have abandoned without explanation its purported earlier policy of exempting brief or fleeting nudity from indecency sanctions. The more plausible conclusion is that the FCC in *Young Broadcasting* said nothing about a categorical exemption for brief nudity because no such exemption existed.

Respondents assert (Br. in Opp. 19) that the order in *Young Broadcasting* "does not constitute binding FCC precedent" because the Commission has not issued a forfeiture. *Young Broadcasting* is significant, however,

because it clearly reflects the Commission's understanding, at the time of the 2004 Super Bowl, that indecency sanctions could properly be based upon the broadcast of fleeting nudity. The fact that the Commission did not ultimately impose a monetary forfeiture in *Young Broadcasting* does not diminish the significance of the case as evidence of then-existing FCC policy.

4. Respondents contend (Br. in Opp. 14 n.7) that the decision below prevents the Commission from taking action only with respect to broadcasts that occurred before the FCC eliminated the isolated-expletive exception in *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975 (2004) (*Golden Globe Awards Order*). The court of appeals stated, however, that because the *Golden Globe Awards Order* addressed only expletives, "a residual policy on other categories of fleeting material—including all broadcast content other than expletives—remained in effect." Pet. App. 23a. Under the decision below, the Commission therefore may not take action against broadcasts involving brief images, no matter how sexually explicit or offensive those images may be, and no matter what time of day they are aired and how many children are in the viewing audience, until it formally changes the policy that the court of appeals (erroneously) concluded still exists. That result warrants review.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be held pending this Court's decision in *FCC* v. *Fox Television Stations, Inc.*, No. 07-582, and then disposed of accordingly.

Respectfully submitted.

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JANUARY 2009